Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

HUGHES SALARIED RETIREES ACTION COMMITTEE, PETER FORMO, RICHARD E. MILLER and NORMAN C. RIGBY, Individually and as Members,

Petitioners,

vs.

ADMINISTRATOR OF THE HUGHES NON-BARGAINING RETIREMENT PLAN,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITIONERS' REPLY

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REPLY STATEMENT

In the period between the filing of the Petition and Respondent's Reply Brief this Court decided *Varity Corporation v. Howe*, _ U.S._, 116 S.Ct. 1065, 64 USLW 4138, No. 94-1471 (March 19, 1996). As will be shown below, *Varity* strongly suggests that this Court grant the petition for writ of certiorari and hear this case, or alternatively, vacate the judgment and remand the case to the United States Court of Appeals for the Ninth Circuit for further consideration in light of it.

REPLY ARGUMENT

THIS COURT SHOULD GRANT THE PETITION FOR WRIT OF CERTIORARI AND HEAR THIS CASE, OR ALTERNATIVELY, VACATE THE JUDGMENT AND REMAND THE CASE TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT FOR FURTHER CONSIDERATION IN LIGHT OF THE COURT'S DECISION IN *VARITY V. HOWE*

The primary question in the present case is whether Section 404 of the Employee Retirement Income Security Act ("ERISA"), 29 U.S.C. Section 1104, ERISA's fiduciary duty provision, preserves the existing common-law duty of a trust fiduciary to provide a beneficiary with the trust's list of names and addresses of other beneficiaries, or some alternative means, to communicate with them about the payment of benefits or administration of the trust. The en banc panel of the Court of Appeals of the Ninth Circuit, by a 7-4 vote reversing the original decision of that Court, held that ERISA's fiduciary provision did not preserve this common-law duty of the fiduciary.[1] In *Varity*

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[1] While the en banc decision skirted the issue of whether ERISA's disclosure provision's (Section 104) listing of certain documents to be disclosed means that the fiduciary has no duty under Section 404 to disclose any others, it is nonetheless obviously an issue in this case (*see* Respondent's Brief, Point II(D) at p.6) and may be properly addressed by this Court. This Court implicitly rejected that argument by the language and logic of *Varity* and left it ripe for future determintation. In order for this Court to decide whether the common law duty to produce a list of beneficiaries is preserved by ERISA it must necessarily decide this in light of the express disclosure provisions of ERISA. The issue of whether the express disclosure provisions of ERISA Section 104 mandate production of the list (as argued by the Petitioners' and rejected by (continued...)

Corporation v. Howe, supra, this Court interpreted and applied the general fiduciary duty provision of ERISA and held:

> "In doing so, we recognized that these fiduciary duties draw much of their content from the common law of trusts, the law that governed most benefit plans before ERISA's enactment. *See Central States, Southeast & Southwest Areas Pension Fund v. Central Transport, Inc.*, 472 U.S. 559, 570 (1985) (("[R]ather than explicitly enumerating *all of the powers and duties of trustees and other fiduciaries, Congress invoked the common law of trusts to define the general scope of their authority and responsibility"); H.R.Rep. No. 93-533, pp. 3-5, 11-13 (1973), 2 Legislative History of the Employment Retirement Income Security Act of 1974 (Committee Print compiled for the Senate Subcommittee on Labor of the Committee on Labor and Public Welfare by the Library of Congress), Ser. No. 93-406, pp. 2350-2352, 2358-2360 (1976) (hereinafter Leg. Hist.); G. Bogert & G. Bogert, Law of Trusts and Trustees Section 255, p. 343 (rev. 2d ed. 1992).

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[1](...continued)
the Court of Appeals) is directly raised in this petition. If this Court rejects that argument it must of course decide whether production of the list may still be required by the fiduciary duty provisions. *Varity* leaves that issue ripe for determination and this case is an ideal one in which to decide it if required.

> We also recognize, however, that trust law does not tell the entire story. After all, ERISA's standards and procedural protections partly reflect a congressional determination that the common law of trusts did not offer completely satisfactory protection...In some instances, trust law will offer only a starting point, after which courts must go on to ask whether, or to what extent, the language of the statute, its structure, or its purposes require departing from common-law trust requirements. And, in doing so, courts may have to take account of competing congressional purposes, such as Congress' desire to offer employees enhanced protection for their benefits, on the one hand, and, on the other, its desire not to create a system that is so complex that administrative costs, or litigation expenses, unduly discourage employers from offering welfare benefit plans in the first place."

116 S.Ct. at 1070. *Varity* is decisive and requires the reversal of the en banc panel's decision herein because this Court has clearly held that ERISA's fiduciary provision is based upon, incorporates and was intended to enhance the common-law fiduciary duties of a trustee, while the en banc decision rests on the premise that ERISA's fiduciary provision was intended to displace the common-law duty of fiduciaries to produce a list of

beneficiaries when requested in connection with the administration of the trust.[2]

This Court in *Varity* specifically and pointedly cites *Bogert & Bogert*, the premier treatise on the common law of trusts, while the en banc panel held that *Bogert & Bogert* is inapplicable and "adds nothing" to the understanding of the general fiduciary standard in ERISA Section 404. The issue is crucial and determinative because, as *Bogert & Bogert* reflect, a common-law duty of a fiduciary is to permit the beneficiaries of a trust access to the list of names and addressing to be able to communicate with fellow beneficiaries concerning the trust's

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[2] Respondent cites *Curtiss- Wright Corp. v. Schoonenjongen,* U.S. , 115 S.Ct.1223, 131 L.Ed. 2d 94 (1995) for its argument that ERISA's comprehensive disclosure scheme precludes reliance on the fiduciary duty provisions of ERISA for obtaining further disclosure. As noted above, this issue is left ripe for determination by *Varity,* which expressly states that a fiduciary's duty may require disclosure beyond that which is specified in the disclosure provisions. Moreover, as pointed out in the orginal petition, this Court held in *Curtiss- Wright,* 115 S.Ct. at 1231, that in determining the validity of an amendment of a trust document under ERISA, where the company, as here, was the plan fiduciary, the courts are to look to ordinary principles of trust and corporate law . 115 S.Ct. 1223 at 1231.

benefits and administration.[3] There is no realistic claim here that this duty was limited by Congress' concern not to increase benefit plan costs, since the provision of the list to the beneficiaries herein was essentially without cost to the plan and any costs would be reimbursed by the Petitioners. Indeed, in lieu of provision of the list, petitioners sought a mailing through the plan itself at cost to the petitioners.

Additionally, this Court in *Varity* held that ERISA did not reduce or limit fiduciaries' duties by explicitly enumerating them. In addition to the discussion excerpted above, the *Varity* decision held:

> "There is more to plan (or trust) administration than simply complying with the specific duties imposed by the plan documents or statutory regime; it also includes the activities that are "ordinary and natural means" or achieving the "objective" of the plan. Bogert & Bogert, supra, Section 551, at 41-52. ...If the fiduciary duty applied to nothing more than activities already

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[3] G. Bogert & G. Bogert, *The Law of Trusts and Trustees* (Rev. 2d Ed. 1978), § 961, p. 7, states squarely that a "***beneficiary may demand a list of the other beneficiaries....***"

> controlled by other specific legal duties, it would serve no purpose." 116 S.Ct. at 1073.

The *Varity* decision affirms the holding of the original panel below in the present case, that ERISA's fiduciary provision, Section 404, is a broad protection and enhancement of fiduciary duties to trust beneficiaries. Surely the basic right to communicate with fellow beneficiaries with respect to trust matters such as benefits and plan administration, recognized at common law and by the premier authority on trust law, is within ERISA's fiduciary provision.

Lastly, Respondent alludes to the "privacy concerns" expressed by the "amici" below. The Court should note that two of these "amici" are retiree and employee organizations officially sponsored by Hughes Aircraft. Moreover, the reference to *U.S. Department of Defense v. F.L.R.A.*, --US--, 114 S.Ct. 1006 (1994), is misplaced. That case involved the disclosure of names and addresses of public employees to a

union under the Freedom of Information Act, 5 U.S.C. § 552 ("FOIA") when the privacy of the employees involved was expressly protected by the Privacy Act, 5 U.S.C. § 552a. Here, neither FOIA nor the Privacy Act is applicable. Hughes Aircraft is a private company. A private employer, such as Hughes Aircraft, must produce a list of the names and addresses of all employees so that the union can communicate with them before a union election. *Excelsior Underwear, Inc.*, 156 N.L.R.B. 1236 (1966). This Court has directed enforcement of the N.L.R.B.'s subpoena directing an employer to produce such a list. *N.L.R.B. v. Wyman Gordon Co.*, 394 U.S. 759, 89 S.Ct. 1426 (1969) the N.L.R.B. has rigorously enforced this rule for over 30 years. The only other amicus brief below was filed by a Teamster pension fund. It is noteworthy that of all union pension funds, only the Teamsters submitted a brief below to prevent retirees from contacting fellow plan participants for help in policing the plan which provides their benefits. ERISA was enacted, in part, to prevent abuses by union pension funds, especially the

Teamsters. Not only have abuses by many other Teamster funds been checked by ERISA,[4] and not only has the International Brotherhood of Teamsters (the "Teamsters International") settled a federal RICO suit by agreeing to court supervision[5], but the very fund which filed the amicus brief also has a reported history of abuses. *United States v. Teamsters*, 964 F.2d 180 (2d Cir. 1992).

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[4] *See*, e.g., *Donovan v. Fitzsimmons*, 778 F.2d 298 (7th Cir. 1985) (approving settlement of class action asset mismanagement and improper benefit structure claims against Teamsters Central States Pension Fund); *Secretary of Labor v. Fitzsimmons*, 805 F.2d 682 (7th Cir. 1986) (permitting Secretary to pursue further claims notwithstanding settlement); *Katsaros v. Cody*, 744 F.2d 270 (2d Cir.), *cert. denied*, 469 U.S. 1072 (1984) (fund trustees found liable for losses and replaced by Court-appointed managers); *Marshall v. Snyder*, 572 F.2d 894 (2d Cir. 1978) (receiver appointed and improper transactions by fund enjoined); *McDougall v. Donovan*, 552 F.Supp. 1206 (N.D. Ill. 1982) (purchase from the union at above-market value of a jet plane found improper).

[5] *See United States v. Teamsters*, Consent Decree entered March 14, 1989 (S.D.N.Y.)

Conclusion

For these reasons, we respectfully urge that the Court should grant the writ of certiorari and hear the appeal or vacate the judgment and remand the case the to United States Court of Appeals for the Ninth Circuit for further consideration in light of this Court's decision in *Varity v. Howe*.

Dated: New York, New York
April 18, 1996

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